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No. 81-127

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN G. GETZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the decision below dismissing his appeal from a district court order enforcing a third-party Internal Revenue summons directed against his bank. Because the bank has fully complied with the summons by producing financial records relevant to the income tax liability of petitioner and his wife, the case is moot. Accordingly, the petition should be denied.

The pertinent facts may be summarized as follows: Pursuant to Section 7609 of the Internal Revenue Code of 1954 (26 U.S.C.), petitioner intervened in this summons enforcement proceeding brought by the government and an agent of the Internal Revenue Service in the United States District Court for the Middle District of Georgia against the Citizens and Southern Bank of Milledgeville and the bank's president, seeking the production of financial records relevant to petitioner's federal income tax liability for 1978. After the district court filed its enforcement order (Pet.

App. 7-9), and entered judgment (Pet. App. 10), the bank fully complied with the summons.

The court of appeals dismissed petitioner's appeal as moot (Pet. App. 1-2). It therefore refused to consider his argument that the district court had erred in denying his request for discovery and in quashing the subpoenas duces tecum he had served upon various officials of the Internal Revenue Service.

The only relief sought by the government in this case was enforcement of the summons. Since this relief was obtained when the bank complied with the summons, there is no longer a case or controversy and the court of appeals properly dismissed the case as moot. *United States* v. *Equity Farmers Elevator*, 48 A.F.T.R. 2d 81-5648 (8th Cir. July 1, 1981); *United States* v. *First American Bank*, 649 F. 2d 288 (5th Cir. 1981);[1] *United States* v. *Silva & Silva Accountancy Corp.*, 641 F. 2d 710 (9th Cir. 1981); *United States* v. *Aquinas College Credit Union*, 635 F. 2d 887 (6th Cir. 1980), cert. denied, No. 80-1460 (Apr. 6, 1981); *United States* v. *Arthur Andersen & Co.*, 623 F. 2d 720 (1st Cir. 1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Barney* v. *United States*, 568 F. 2d 116 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *Vesco* v. *SEC*, 462 F. 2d 1350 (3d Cir. 1972) (analogous S.E.C. subpoena case).[2]

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[1]Petitioner errs in his assertion (Pet. 10-12) that there is "no Case Law" on mootness in the Fifth Circuit. In *United States* v. *First American Bank*, the court, relying on "the established law of this circuit" (649 F. 2d at 289), held that compliance by a third-party recordkeeper with an order enforcing an Internal Revenue summons moots any appeal from that enforcement order.

[2]In *United States* v. *Friedman*, 532 F. 2d 928, 931 (3d Cir. 1976) the court held that a summons enforcement appeal was not moot, despite the summoned party's compliance, because the validity of the summons could arise upon a later motion to suppress the summoned records at a subsequent civil or criminal tax proceeding. Although we believe that

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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the proper remedy there would have been for the court of appeals to remand the case to the district court to vacate the enforcement order so mooted by compliance (as the court below did), *Friedman* is, at all events, distinguishable on its facts because "there ha[d] been incomplete compliance with the court's order since the IRS ha[d] not yet taken [a particular witness'] testimony" (*ibid.*).